

**ADMINISTRATIVE APPEAL DECISION  
CLEAN WATER ACT  
LINKSIDE PLACE  
CITY OF OROVILLE, CALIFORNIA  
SACRAMENTO DISTRICT  
FILE NUMBER 200200475**

**DATE: December 17, 2008**

**Review Officer:** Michael Montone, U.S. Army Corps of Engineers (Corps), Great Lakes and Ohio River Division, Cincinnati, Ohio

**Appellant:** Mr. Bert Garland, Linkside Place, LLC

**District Representative:** Brian E. Vierria, U.S. Army Corps of Engineers, Sacramento District (District)

**Authority:** Clean Water Act (33 USC 1344)

**Receipt of Request for Appeal:** January 10, 2008

**Appeal Meeting and Site Visit Date:** July 31, 2008

**Summary of Decision:** This CWA jurisdictional determination is remanded to the District for further evaluation and consideration of its determination that wetlands on the Linkside Place property are subject to jurisdiction under Section 404 of the Clean Water Act.

**Background Information:**

On November 1, 2007, the District issued the appellant an approved jurisdictional determination (JD) stating the presence of waters of the U.S. including approximately 15 acres of wetlands. The District identified the wetlands as a contiguous vernal pool wetland complex and based its approved JD on the Arid West Regional Supplement to the 1987 Corps Wetland Delineation Manual (AWR 1987 Manual) and its determination that the wetlands are adjacent to and flow to the Feather River. The District also documented its approved JD using an approved JD form.

The appellant disagrees with the District's approved JD and appealed its decision on December 31, 2007.

**Appeal Evaluation, Findings and Instructions to the Sacramento District Engineer (DE):**

**REASON 1: The Linkside wetlands come within the exception for wetlands adjacent to waters that are themselves wetlands because they are truly adjacent only to golf course wetlands on the adjoining property (they are over 1.5 miles distant from the Feather River, the nearest TNW).**

**FINDING:** This reason for appeal has merit.

**ACTION:** The District must further document its conclusion that the wetlands on the Linkside Place property are wetlands adjacent to waters other than waters that are wetlands themselves. In doing so, the District should consider and address the location and relationship between the Linkside Place wetlands and the golf course wetlands and any water that the District may determine the Linkside wetlands are adjacent to.

**DISCUSSION:** According to Corps regulations at 33 CFR 328.3(a)(7), waters of the U.S. include wetlands adjacent to waters other than waters that are themselves wetlands. According to the District's administrative record, the appellant initially raised the issue articulated in appeal reason 1 to the District in a letter dated February 23, 2005 (see District administrative record, page nos. 670 to 674).

The District's documentation and rationale supporting its approved JD is limited to its approved JD letter and approved JD form. The District's letter states the presence of waters of the U.S. including approximately 15 acres of a contiguous vernal pool wetland complex, bases its approved JD on the AWR 1987 Manual, and states that the wetlands are adjacent to and flow to the Feather River. The AWR 1987 Manual addresses methods for assessing vernal pools, but does not appear to provide substantial rationale for classifying wetlands as a "contiguous vernal pool wetland complex."

Information provided by the appellant and included in the administrative record (see District administrative record, page nos. 103 and 104) appears to show three distinct watersheds or micro-basins within the project site. This information appears to demonstrate that wetlands within the project site are comprised of at least three distinct wetland areas, each flowing in a separate and distinct direction. It is unclear from the District's documentation how it considered this information and ultimately concluded that the wetlands on-site were "contiguous" and adjacent to a Traditional Navigable Water (TNW) and not other waters that were themselves wetlands.

The term "complex" is understood to refer to the close proximity of multiple wetlands areas. In this case, it is reasonable to use the term to refer to the hundreds of smaller wetland areas located extremely close to one another.

Therefore, for the reason stated above, this reason for appeal has merit and the approved JD is remanded to the District for further documentation and reconsideration as necessary.

**REASON 2: The wetlands at the Linkside Estates Project Site (“Linkside”) do not comprise a “contiguous vernal pool wetland complex” because (a) they are discrete, identifiable wetland features; and (b) variations in topography result in site wetlands draining away from the golf course wetlands that drain in the direction of the Feather River.**

**FINDING:** This reason for appeal has merit.

**ACTION:** The District must also clearly document the general relationship between the multiple of wetland areas defined as a “contiguous vernal pool wetland complex.” The District’s documentation should address the appellant’s concerns that wetland areas are discrete and part of micro-basins and clarify how it determined to the contrary that the wetlands were all part of one large, contiguous complex and the direction it generally flows.

**DISCUSSION:** As noted above in appeal reason 1, information provided by the appellant and included in the administrative record appears to demonstrate that wetlands areas on-site are contained within three distinct micro-basins. The District did not address this information or substantially document how it determined that wetlands on-site are part of a single complex and not merely discrete wetlands or discrete wetland complexes. Therefore, this reason for appeal has merit and the approved JD is remanded to the District for further documentation and reconsideration as necessary.

Also, without further documentation, it is unclear if the District is using the term “contiguous” to describe how the wetland complex is adjacent<sup>1</sup> to the TNW or if contiguous refers to the nature of the smaller identified wetland areas in relationship with one another. The District should clarify its use of the term “adjacent” and document how it considered the relationship between the wetlands and the Feather River (i.e. bordering, contiguous, or neighboring).

Therefore, for the reason stated above, this reason for appeal has merit and the approved JD is remanded to the District for further documentation and reconsideration as necessary.

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<sup>1</sup> Corps regulations at 33 CFR 328.3.c. define the term “adjacent” as bordering, *contiguous* [emphasis added], or neighboring.

**REASONS 3 and 4: Jurisdiction is improper because no evidence establishes the existence of a “vernal pool complex,” of which the Linkside site is alleged to be a part, extending from the project site to the Feather River. No evidence exists to show jurisdiction by hydrologic connectivity or adjacency to Feather River, the nearest TNW.<sup>2</sup>**

**FINDING:** This combined reason for appeal has merit.

**ACTION:** The District must document and substantially support its determination that the Feather River is a TNW. The District must also clarify and support the relationship between any wetlands on the site and the Feather River (e.g. adjacency).

**DISCUSSION:** The District’s documentation and rationale supporting its approved JD is limited to its approved JD letter and approved JD form. The District’s letter states the presence of waters of the U.S. including a contiguous vernal pool wetland complex, based its approved JD on the AWR 1987 Manual, and stated that the wetlands are adjacent to and flow to the Feather River. In addition, the District also documented on its approved JD form the presence of wetlands adjacent to TNWs. However, the form lacked information indentifying the Feather River or other water as a TNW and a rationale to support its determination that the Feather River or other water is a TNW (see approved JD form, III.A.1.).

As previously discussed above, information submitted by the appellant and contained within the District administrative record appear to demonstrate that wetlands on site flow in three separate and distinct directions (see administrative record pages 103 and 104). According to this information, the wetlands on site flow 1) towards Thermalito Afterbay, 2) towards an adjacent gold course and then towards Feather River, and 3) towards the Feather River. In scenario 2 and 3, maps indicate that the flow stops approximately 1 mile short of the Feather River. It is unclear from the District’s documentation how it determined that flow from the wetlands ultimately discharges into the Feather River in these cases. Upon reconsideration, the District should characterize and document the flow leaving the wetlands and ultimately discharging into the Feather River (e.g. describe the structure of any conveyances present and the frequency of flow).

At the time of its decision, information posted to the District’s website categorized the Feather River as Navigable River under Section 10 of the River and Harbor Act. However, according to the website, the portion of the Feather River that is navigable begins at its mouth and terminates at the Marysville Bridge, approximately 20 linear miles south of the project area. Without further documentation, it is unclear how the District classifies the section of the Feather River that is closest to the project site (approximately one mile south of project area).

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<sup>2</sup> For purposes of this appeal evaluation, appeal Reasons 3 and 4 were combined. In its submitted form, Appeal Reason 3 stated: Jurisdiction is improper because no evidence establishes the existence of a “vernal pool complex,” of which the Linkside site is alleged to be a part, extending from the project site to the Feather River. In its submitted form, Appeal Reason 4 stated: No evidence exists to show jurisdiction by hydrologic connectivity or adjacency to Feather River, the nearest TNW.

Therefore, for the reason stated above, this reason for appeal has merit and the approved JD is remanded to the District for further documentation and reconsideration as necessary.

**Reason 5: The Linkside vernal pools lack a significant nexus to the Feather River and therefore they do not have a more than insubstantial or speculative impact on the nearest TNW. (*Rapanos*)**

**FINDING:** This reason for appeal may have merit.

**ACTION:** Prior to making its final determination, the District must further consider and document its conclusions as directed under Reasons 1 through 4 above.

**DISCUSSION:** The District is not necessarily bound to document a significant nexus between wetlands on-site and a TNW in order to assert its jurisdiction. However, if after further consideration (following the direction provided under Reasons 1 through 4 above) the District determines that wetlands on-site are not adjacent to a TNW nor directly abutting a relatively permanent water, it shall consider and document whether or not a significant nexus exists between the wetlands on-site and the nearest TNW prior to making its final decision.

**Information Received and its Disposition During the Appeal Review:** The administrative appeal was evaluated based on the District's administrative record and the Appellant's Request for Appeal.

**Conclusion:** This CWA jurisdictional determination is remanded to the District for further evaluation and consideration of its determination that wetlands on the Linkside Place property are subject to jurisdiction under Section 404 of the Clean Water Act. This evaluation must follow the *Rapanos* guidance jointly issued on June 5, 2007, by the U.S. Environmental Protection Agency and the Corps and the January 28, 2008 CECW-CO Memorandum; SUBJECT: "*Process for Coordinating Jurisdictional Determinations Conducted Pursuant to Section 404 of the Clean Water Act in Light of the Rapanos and SWANCC Supreme Court Decisions.*" .

**ORIGINAL SIGNED**

John R. McMahon  
Brigadier General, U. S Army  
Commanding